87-615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELISSA DETSEL, an infant by her mother and next friend, MARY JO DETSEL,

Petitioner,

—v.—

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, PETER KACHRIS, individually and as Superintendent of the Auburn Enlarged City School District, GORDON AMBACH, Commissioner of the New York State Education Department,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. In an action under The Education of All Handicapped Children Act and regulations promulgated thereunder, did the Court of Appeals err in creating an *ad hoc* balancing test to determine whether the services of a nurse, necessary for a child to attend school, are "related services" and not exempt as "medical services", rather than applying the bright line test contained in the regulations as applied by this Court which provide that handicapped children are entitled to receive such services so long as they can be performed by a school nurse and not by a physician?

2. Did the Court of Appeals err in holding that a school district may properly refuse to provide school nursing services to a handicapped child where the child will, contrary to the fundamental purpose of the Act and decisions of this Court, be relegated to instruction at home away from other children, and where the cost of providing teachers and other services at the child's home as required by the Act will exceed the cost of providing nursing services in school?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Northern District of New York denying petitioner's motion for summary judgment, granting respondents' motions for summary judgment and dismissing the action.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (App. 1a)[1] is reported at 820 F.2d 587 (2d Cir. 1987).

The opinion of the United States District Court for the Northern District of New York (App. 3a) is reported at 637 F. Supp. 1022 (N.D.N.Y. 1986).

[1] References to "App." are to the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1987. By order of this Court dated September 3, 1987, the time to file this petition was extended to and including October 13, 1987. (App. 14a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved in this proceeding are The Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*; 34 C.F.R. § 300.13 (1987); 34 C.F.R. §§ 300.500-556 (1987). (App. 15a-21a).

STATEMENT OF THE CASE

This is an action arising out of the failure by Respondent-The Board of Education of the Auburn Enlarged City School District (the "School District") to fulfill its obligation under The Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (the "EAHCA" or the "Act") and regulations promulgated thereunder by the United States Department of Education (the "Regulations"), to provide for nursing services required by a handicapped child in order to attend school. As a result of the School District's refusal to carry out its responsibilities, Melissa Detsel, a bright nine-year old handicapped child, will be confined to her home. Contrary to the fundamental purpose of the EAHCA, she — and hundreds of children like her — will thus be deprived of the benefits of interaction with other handicapped and nonhandicapped children.[2]

In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), this Court held that nursing services must be provided upon a showing that (1) the service is required to assist a

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[2]The Office of Technology Assessment estimates that between 680 and 2000 children have potentially the same needs as Melissa. Office of Technology Assessment, *Technology Dependent Children: Hospital Care v. Home Care* (1987) at p. 31.

handicapped child to benefit from special education; and (2) the service is not excluded as a "medical service," defined in the Regulations as certain services which must be provided by a physician. Holding that the Regulations should be afforded deference, this Court further found that the definition of "medical services" therein excluded only services which must necessarily be provided by a physician – not by a school nurse or other qualified person.

There is no dispute under the first prong of the *Tatro* test that the health care services involved in this case are required to assist Melissa to benefit from special education. Respondents conceded, and the District Court held, that without these supportive services Melissa would not be able to attend school and could not receive the benefits of the special education program designed for her. There is also no dispute, as Respondents have further conceded, that the services required by Melissa are within the competence and expertise of a school nurse, and that they need not be performed by a physician.

The principal issue presented for review is whether the Court below applied the correct standard in determining that the nursing services required by Melissa are "medical services" and thus excluded from the EAHCA, even though the services were unquestionably within the competence and expertise of a school nurse. Instead of applying the clearcut criteria contained in the Regulations and employed by this Court in *Tatro*, the Second Circuit adopted a "balancing test" to determine whether nursing services are "medical services." Under the novel test fashioned by the Second Circuit, an *ad hoc* examination of such factors as whether the services are "complex" or "intermittent," among other individual circumstances, is required to determine whether they should properly be excluded as "medical services." Contrary to the Regulations and this Court's decision in *Tatro*, the level of expertise of the provider of the services is not even the predominant, let alone the dispositive, factor to be weighed in the balancing test endorsed by the court below. Petitioner respectfully submits that the decision by the Second Circuit presents conflicts with this Court and other Circuits, raises

important questions of federal law and statutory construction, and will lead to uncertainty, protracted litigation and conflicting results in both administrative and judicial forums.

In addition, the Second Circuit failed improperly to take into account the fundamental purpose of the Act which is, as this Court recognized in *Board of Education v. Rowley*, 458 U.S. 176 (1982), to educate handicapped children with non-handicapped children whenever possible. The anomalous result of the decision below is that Melissa will receive instruction by one or more teachers at her home, at a cost to respondents that will exceed the cost of providing nursing services in school. By relegating the child to home instruction and depriving her of interaction with other children for no rational purpose, the decision below frustrates the accomplishment of the Act's primary goal.

A. *The Facts*

Melissa is a bright nine-year old physically handicapped child with an incomplete diaphragm and an abnormally developed lung. She breathes with the assistance of a ventilator through a tracheostomy and is fed and receives medication through a gastrostomy and jejunostomy tube.

Her conditions require respiration and feeding assistance, frequent monitoring of her respiratory status, including the administration of oxygen. Because of the potential for congestive heart failure, a nurse must be available to provide cardiopulmonary resuscitation, if necessary. It is undisputed that while each element of this assistance may not ordinarily be administered by a layman, the care can be provided by a licensed practical nurse ("LPN") or a registered nurse ("RN"), such as the nurse employed by the School District. The expertise of a physician is not required.

As a result of the decision below, Melissa will be confined to her home and deprived of the educational benefits associated

with her interaction with other children.[3] The Medicaid program for which she is eligible will provide for nursing care at her home (but not at school), and the School District has acknowledged its obligation to provide one or more teachers and therapists in Melissa's home. The School District has further acknowledged that the costs of providing educational services to Melissa at home exceed the cost of providing for nursing services in school.

B. *The Administrative Hearings*

When petitioner was first notified that the nursing services would be terminated, she requested an impartial hearing. After two days of testimony by seven witnesses, the hearing officer entered an order directing respondents to "provide a suitably trained person to attend to [Melissa's] needs while [attending] a special education class." He concluded that application of *Tatro*, and the relevant provisions of the EAHCA and regulations, required respondents:

> to provide appropriate supportive services to meet both the routine as well as the potentially life threatening needs exhibited by Melissa Detsel, provided that the needs can be met without a physician, so that she will be able to continue to attend the public school program prescribed [by the school district's committee on the handicapped].

Respondent-School District appealed to the New York State Commissioner of Education who reversed the hearing officer's decision.

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[3] Since Melissa has begun to attend school, she has interacted regularly with non-handicapped children in recreational activities and in the classroom. Her treating physician attributed her rapid acceleration of speech, communication and social skills directly to her ability to interact with other children.

C. *The Proceedings in the District Court*

Petitioner instituted this action in the United States District Court for the Northern District of New York seeking an order requiring, among other things, Respondent-The School District to provide nursing care while Melissa attended school. All parties moved for summary judgment, and there are no material facts in dispute.

Conceding that the services required by Melissa could be performed competently by a school nurse, respondents contended that the nursing services fell within the "medical services" exclusion. As set forth in the District Court's opinion, respondents urged the court "to ignore the technical distinction in the Regulations which would exclude therapeutic services when performed by a physician but would not exclude services of this type when performed by a school nurse or other qualified person." (App. 9a). Respondents maintained that instead of the bright line provision contained in the Regulations, which turns on the qualifications of the provider of the services, an *ad hoc* inquiry into the nature, extent and complexity of the services was required to determine whether the exclusion applied. In June, 1986, the District Court denied petitioner's motion for summary judgment, awarded summary judgment for respondents and dismissed the action.

In its analysis, the District Court departed from the textual requirements of the EAHCA and the Regulations. It found that notwithstanding the language of the Regulations, the qualifications of the provider of the services had no bearing upon its determination. The District Court held that the nursing services required by Melissa "more closely resemble" the "medical services specifically excluded" from the Act. It noted explicitly that "even though the services do not fulfill the 'physician' requirement set forth in [the Regulations], the exclusion of the disputed services is in keeping with its spirit." (App. 12a).

D. *The Court of Appeals Decision*

The Second Circuit affirmed the judgment of the District Court. In a *per curiam* opinion, it adopted the unprecedented

ad hoc balancing test applied by the District Court and concluded that "in all the circumstances, the district court gave proper effect to the statutory scheme in balancing the interests of the parties." (App. 2a). The opinion made no mention of this Court's decision in *Tatro*, and failed to address the "mainstreaming" requirement of the EAHCA which, as this Court held in *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), "requires participating States to educate handicapped children with nonhandicapped children whenever possible."

In its decision, the Second Circuit cited only to the decision by the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *aff'g in relevant part* 531 F. Supp. 517 (D. Haw. 1982), *cert. denied*, 471 U.S. 1117 (1985), which ordered a school board to provide nursing services. The court attempted to distinguish the Ninth Circuit's decision under its balancing test, finding that the services at issue in that case were "intermittent, not constant," and did not require "as much expertise." (App. 2a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE STANDARD TO APPLY IN DETERMINING WHETHER SCHOOL NURSING SERVICES MUST BE PROVIDED TO HANDICAPPED CHILDREN AND PRESENTS IMPORTANT ISSUES OF FEDERAL LAW AND STATUTORY CONSTRUCTION

Congress enacted the EAHCA in 1975 in light of the "[i]ncreased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for handicapped children." S. Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1429. With respect to the objective of ensuring that

handicapped children are educated in a regular environment, the legislative history of the Act provides:

> [W]hile instruction *may take place in such locations as* classrooms, *the child's home*, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that *to the maximum extent appropriate handicapped children must be educated with children who are not handicapped*, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.

S. Rep. No. 455, 94th Cong., 1st Sess. 30, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1480, 1483 (emphasis supplied). To insure that handicapped children are able to attend school, the Act includes a wide range of "related services," which are defined as:

> transportation, and such developmental, corrective, and other *supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and *medical* and counseling services, *except that such medical services shall be for diagnostic and evaluation purposes only)* as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapped conditions in children.

20 U.S.C. § 1401(17) (emphasis supplied). The term "related services" is defined explicitly in the Regulations as a term that "also includes school health services." 34 C.F.R. §§ 300.13(a) (1987). In turn, "school health services" are defined to mean "services provided by a *qualified school nurse or other qualified person*." 34 C.F.R. § 300.13(b)(10) (1987) (emphasis supplied).

The Regulations expressly distinguish between services provided by physicians and by school nurses or other qualified persons. The term "medical services," which are excluded from Section 1401(17) of the Act, are defined in the Regulations as "services provided by a licensed physician." 34 C.F.R. § 300.13(b)(4) (1987). The statutory and regulatory scheme is thus simple. When health care services are required in order for the child to attend school, a school district must provide them unless the required service can only be performed by a physician.

A. A Balancing Test Fundamentally Conflicts with the Applicable Regulations and *Tatro*

In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), this Court applied the Regulations according to their terms in determining whether the school district was obligated to provide as a "related service" a procedure known as clean intermittent catheterization, required by the handicapped child every three or four hours to avoid injury to her kidneys. This Court held:

> The regulations define "related services" for handicapped children to include "school health services" which are defined in turn as "services provided by a qualified school nurse or other qualified person." "Medical services" are defined as "services provided by a licensed physician." Thus, the Secretary [of Education] has determined that the services of a school nurse . . . are not subject to exclusion as a "medical service," but that the services of a physician are excludable as such.

468 U.S. at 892 (citations omitted).[4]

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[4] In response to the school district's fears that this construction of the Regulations could require it to provide for every necessary life support system, this Court further identified three limitations embodied in the legislative scheme. First, in order to be entitled to receive the service, the child must be handicapped as defined by the EAHCA and regulations. Second, the service must be necessary to aid a handicapped child to benefit from special education.

(Footnote Continued)

In conflict with this standard, the Second Circuit concluded that the district court "gave proper effect to the statutory scheme in balancing the interests of the parties." (App. 2a). The novel and amorphous "balancing test" endorsed by the Second Circuit directly conflicts with the plain wording of the applicable statutory and regulatory provisions as applied in *Tatro*. The Second Circuit virtually ignored the bright line test contained in the Regulations which do not refer to such individualized, *ad hoc* determinations. As this Court held in *Tatro*, the "Secretary [of Education's determination] that the services of a school nurse . . . are not subject to exclusion as a 'medical service,' but that the services of a physician are excludable as such" reasonably reflects Congress' intent and therefore must be given deference. *Tatro*, 468 U.S. at 892. By eliminating the qualifications of the provider as the determinent factor, the Second Circuit failed to defer to the regulations promulgated by the Department of Education in further conflict with the decision of this Court.

Moreover, even an application of the balancing test endorsed by the Second Circuit reveals not a single legitimate interest of respondents in refusing to provide nursing services to Melissa. Respondents have acknowledged their responsibilities under the EAHCA to provide one or more *teachers* for Melissa at her *home* where the Medicaid program for which Melissa is entitled will provide for nursing care. They have also acknowledged that the cost of providing such educational services at Melissa's home will *exceed the cost* of providing *nursing* services *in school*. In "balancing" the interests of the parties, there is no countervailing factor based on cost savings or otherwise that can even be placed on the scale. In the absence of any competing interest,

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If the treatment or medication could be given during non-school hours, then the school district is not required to provide the service, even if the burden would be minimal. Third, the service need only be provided if it can be performed by a nurse or other person, not a physician. Given these inherent limitations, this Court made clear that its holding would not open the door to requiring a full range of services that might otherwise be argued to constitute "related services." 468 U.S. at 894.

respondents have no basis to refuse to provide the necessary services even under the balancing test applied by the court below.[5]

B. The Balancing Test Applied by the Second Circuit is in Apparent Conflict with the Standard Applied by the Ninth Circuit

The balancing approach followed by the Second Circuit is also in apparent conflict with the decision by the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *aff'g in relevant part* 531 F. Supp. 517 (D. Haw. 1982), *cert. denied*, 471 U.S. 1117 (1985). In *Katherine D.*, the Ninth Circuit properly drew the distinction between "medical services" that must be performed by a physician, and services that can be provided by a nurse or other trained person. Accordingly, it required defendants to provide nursing services which were almost identical to the services at issue in this lawsuit. In that case, the handicapped child required a tracheostomy tube to breathe and expel secretion from her lungs. Her disease caused mucus to accumulate in her lungs, making her susceptible to recurrent pulmonary infections. Because of this condition, the child needed assistance in order to suction her lungs through her tracheostomy tube. Even more critically, she required a person trained to provide emergency care in the event that the tube became dislodged while she was attending school.

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[5] Even if cost were a factor, which here it is not, costs for nursing care are far less burdensome than other costs that the Act routinely requires. *E.g.*, *Clevenger v. Oak Ridge School Bd.*, 744 F.2d 514 (6th Cir. 1984) (requiring residential placement in private institution where necessary to a handicapped child's education); *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom. Scanlon v. Battle*, 452 U.S. 968 (1981) (requiring year round schooling for handicapped children who could not progress if educated for the 180 school day period provided for other children). The Act requires participants "to provide a comprehensive range of services to accomodate a handicapped child's educational needs, regardless of financial and administrative burdens." *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 695 (3d Cir. 1981).

The district court held that these services — the administration of medication, the use of specialized equipment to suction excess mucus and access to a person trained to handle emergency problems with her tracheostomy — were each "EAHCA-mandated related services." 531 F. Supp. at 526. Concluding that these services "can be provided by a nurse or other trained person who need not be a physician", the court found that "this help is within the definition of related services (e.g., because it is a school health service) or is, in any event, not the type of medical assistance which is excludable from the definition of 'related services.' " *Id.*[6] In affirming the district court's decision, the Ninth Circuit held that "[t]hese services could have been provided by a 'school nurse or other qualified person,' and thus fall squarely within the requirements of the Act." 727 F.2d at 815.

The Second Circuit's attempt to square its holding with the Ninth Circuit by drawing minute factual distinctions does not eliminate the conflict in approach between the two decisions. It serves, however, to illustrate the divergent results that will flow from a "balancing test" as opposed to the test contained in the Regulations. Even though the tracheal suctioning and monitoring services were virtually identical to the services required by Melissa, the Second Circuit found the Ninth Circuit's decision "unpersuasive" since the care required in that case was "intermittent, not constant," and "did not require as much expertise." (App. 2a). This effort to reconcile the holdings does not and cannot cure the fundamental conflict between the standards applied by each court. That conflict arises from the divergent standards themselves, not by their application. In *Katherine D.*, the Ninth Circuit found the qualifications of the provider as the cornerstone of the standard it applied, while the "balancing test" applied by the Second Circuit did not even take that critical factor into account.

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[6] Other courts have recognized the distinction between care by a physician and other professionally trained individuals. *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 455 (3d Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, 458 U.S. 1121 (1982); *Doe v. Anrig*, 651 F. Supp. 424, 431 n.6 (D. Mass. 1987); *Antkowiak v. Ambach*, 653 F. Supp. 1405, 1416 (W.D.N.Y. 1987).

C. The Novel Balancing Test Adopted by the Court Below Will Lead to Inconsistent Results in Both Administrative and Judicial Proceedings and Will Generate Protracted Litigation, Unlike the Regulatory Standard Applied in *Tatro*

Application of a "balancing test", requiring a detailed *ad hoc* examination of individual questions such as the nature, extent, complexity and cost of nursing services, will seriously undermine the uniformity of results promoted by the regulatory standard applied in *Tatro* and other courts. Because the test necessarily involves scrutiny of a variety of facts underlying each case, it will inevitably generate uncertainty in the administrative process and lead to protracted litigation and delay in an area of federal concern.

Bevin H. v. Wright, No. 86-1830 (W.D. Pa. August 4, 1987), provides a recent illustration of the uncertainty and delay that will be created by the balancing test. That case, decided within two months of the Second Circuit's decision, reveals that no recognizable standard has emerged as a result of the adoption of the balancing test. In applying this test, the district court found the nursing services "complicated," "extensive," "constant" and "costly" and held that they need not be provided. With such vague formulations guiding courts and administrators, uniformity and consistency cannot be expected, and their *ad hoc* determinations will lead to inevitable delay.

In addition, the court in *Bevin H.* expressly noted that, in its view, the definition of "related services" is subject to "still developing case law." Slip op. at 1. Petitioner respectfully submits that *Tatro* is dispositive, and that the standard used by this Court does not require, and should not be susceptible to, further case law construction. The implication of the Second Circuit's decision and *Bevin H.* is, however, inescapable. By inviting courts to engage in individualized scrutiny of any number of factors they might deem relevant, the entire process will delay the provision of related services to handicapped children at times most critical for their interaction with peers.

The absence of clearcut criteria poses difficulties not only for courts, but also for school administrators and parents who are encouraged to work cooperatively. *See, e.g.*, 34 C.F.R. § 300.504 (1987). In addition, the balancing test will require extensive testimony, including expert testimony, concerning such matters as a comparison of the complexity of the service at issue to those which have been held to be related services. In contrast, under the regulatory standard, the sole issue is whether the service can be provided by a school nurse or qualified person other than a physician. The Second Circuit's displacement of this clearcut regulatory standard is an important area of federal concern and warrants review by this Court.

II. THE SECOND CIRCUIT'S EXPANDED DEFINITION OF THE MEDICAL SERVICES' EXCLUSION CONFLICTS WITH THIS COURT'S ANALYSIS IN *ROWLEY* AND UNDERMINES THE STATUTORY MANDATE TO PROVIDE AN EDUCATION IN A REGULAR SCHOOL ENVIRONMENT WHENEVER POSSIBLE

The decision below also undermines the fundamental purpose of the EAHCA to provide an education in a regular school environment. It failed to take into account the analysis in *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), where this Court reviewed at length the statutory history of the Act and concluded that "[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible."

A handicapped child must be educated in a regular school environment unless "the nature of the handicap is such that education in regular classes with the use of supplementary aids 'cannot be achieved satisfactorily.' " *Espino v. Besteiro*, 520 F. Supp. 905, 911 (S.D. Tex. 1981) (citations omitted) (emphasis supplied); *see Tatro v. Texas*, 625 F.2d 557, 563 n.15 (5th Cir. 1980); *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 456 (3d Cir. 1981), *cert. denied sub nom. Scanlon v. Tokarcik*, 458 U.S. 1121 (1982) (citations omitted). No such showing was or can be made.

Any interpretation of a statutory exception to the general rule requiring supportive services to be provided, 20 U.S.C. § 1401(17), and to the specific inclusion of school health services as a supportive service, must be made within the context of the underlying statutory command to educate handicapped children in the "least restrictive environment." The EAHCA requires that "to the maximum extent appropriate, handicapped children . . .are educated with children who are not handicapped." 20 U.S.C. § 1412(5). It specifically requires the states to assure that "removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes *with the use of supplementary aids and services* cannot be achieved satisfactorily." *Id.* (emphasis added). Thus the statute recognizes the role of supportive services in ensuring compliance with the mandate for education in the least restrictive environment.

The implementing Regulations similarly emphasize the importance of education in the "least restrictive environment." 34 C.F.R. §§ 300.550-556 (1987). They require that "[u]nless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped." 34 C.F.R. § 300.552(c) (1987). When the severity of the handicap is such that the child requires a separate classroom for handicapped children, the participation of the handicapped child with the nonhandicapped in nonacademic settings, such as extracurricular activities, is required. 34 C.F.R. § 300.553 (1987) (and comment thereto).

Home education, to which petitioner and other severely handicapped children will be relegated if respondents prevail, is the most restrictive form of education. *See e.g.*, New York City Board of Education, *Educational Serv. for Students with Handicapping Conditions* (1985) at p. 21. The child is not only isolated from nonhandicapped children, she is removed from all contact with any children in the educational process. This result must be placed in the context of available alternatives. Where, as here, the child will be relegated to home instruction, with the school district providing teachers at home at greater cost than providing nurse care in school, that result is plainly irrational.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
October 13, 1987

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APPENDIX

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Opinion of the Court of Appeals for the Second Circuit

Melissa DETSEL, an Infant, by her mother and next friend Mary Jo DETSEL, Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF the AUBURN ENLARGED CITY SCHOOL DISTRICT, et al., Defendants-Appellees.

No. 1262, Docket 86-7619.

United States Court of Appeals,
Second Circuit.

Argued June 11, 1987.

Decided June 12, 1987.

Appeal from a judgment of the United States District Court for the Northern District of New York, Neal P. McCurn, Judge, see 637 F.Supp. 1022 (1986), dismissing complaint seeking to compel school district to provide nursing services for handicapped child under Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq.

Anne W. Crawford, New York City (Skadden, Arps, Slate, Meagher & Flom, Herbert Semmel, New York Lawyers for the Public Interest, New York City, Legal Services of Central New York, Syracuse, N.Y., on the brief), for plaintiffs-appellants.

Edward C. Hooks, Ithaca, N.Y. (James Charles Holahan, Treman & Clynes, Harris, Beach, Wilcox, Rubin and Levey, Ithaca, N.Y., on the brief), for defendants-appellees Bd. of Educ. of the Auburn Enlarged City School Dist. and Peter Kachris.

Seth Rockmuller, Albany, N.Y. (James H. Whitney, Albany, N.Y., on the brief), for defendant-appellee Com'r of Educ.

Norman H. Gross, Albany, N.Y., filed a brief for New York State School Boards Ass'n as amicus curiae on behalf of defendants-appellees.

Before VAN GRAAFEILAND, KEARSE and MAHONEY, Circuit Judges.

PER CURIAM:

Plaintiff Melissa Detsel, a severely handicapped child, suing by her mother and next friend Mary Jo Detsel, appeals from a final judgment of the United States District Court for the Northern District of New York, Neal P. McCurn, *Judge*, dismissing her complaint seeking to compel defendants Board of Education of the Auburn Enlarged City School District, *et al.*, to provide her with nursing services pursuant to the Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (1982). We conclude that the complaint was properly dismissed for the reasons stated in the opinion of the district court, reported at 637 F.Supp. 1022 (1986).

We are unpersuaded by plaintiffs' argument that the district court gave insufficient deference to the decision in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *aff'g in relevant part*, 531 F.Supp. 517 (D.Haw. 1982), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985), which ordered a school board to provide nursing services. Plaintiffs acknowledge that Melissa needs a full-time person trained to monitor her respiratory status "constantly" and to assist her with her physical needs while she attends school, and that the service must be provided by "at least a licensed practical nurse" and "cannot be adequately provided by a regular school nurse who must care for other children." (Plaintiff's Statement of Facts Pursuant to Northern District Rule 10). In contrast, the opinions of the Ninth Circuit and the Hawaii district court make plain that Katherine D. needed care that was intermittent, not constant, *see* 531 F.Supp. at 520, and which did not require as much expertise, *see* 727 F.2d at 815 n. 6 ("It is indisputable that even a lay person could have been trained to provide the services Katherine required.").

We conclude that, in all the circumstances, the district court gave proper effect to the statutory scheme in balancing the interests of the parties. The judgment of the district court is affirmed.

Opinion of the
District Court for the Northern District of New York

Melissa DETSEL, an infant by her mother and next friend, Mary Jo DETSEL, Plaintiff,

v.

BOARD OF EDUCATION OF the AUBURN ENLARGED CITY SCHOOL DISTRICT, Peter Kachris, individually and as Superintendent of the Auburn Enlarged City School District, Gordon Ambach, Commissioner of the New York State Education Department, Stephen Bandas, individually and as Commissioner of the Cayuga County Department of Social Services, and Cesar Perales, individually and as Commissioner of the New York State Department of Social Services, Defendants.

No. 84-CV-1353.

United States District Court,
N.D. New York.

June 23, 1986.

Mother of handicapped student who attended special education class brought action under Education of All Handicapped Children Act seeking to compel school district and board of education to provide student with constant nursing care while she attended public school. The District Court, McCurn, J., held that Education of All Handicapped Children Act did not require school district and board of education to provide severely physically disabled child with constant in-school nursing care.

Dismissed.

Legal Services of Cent. New York, Inc., Syracuse, N.Y., for plaintiff; Joanne Hunt Piersma, of counsel.

Treman & Clynes, Office of Harris, Beach, Wilcox, Rubin and Levey, Ithaca, N.Y., for defendants Bd. of Educ. of Auburn City School Dist. and Peter Kachris; Edward C. Hooks, of counsel.

Robert D. Stone, Albany, N.Y., for defendant Ambach; James H. Whitney, of counsel.

MEMORANDUM-DECISION AND ORDER

McCURN, District Judge.

1. *Background*

The plaintiff, Mary Jo Detsel, has brought this action on behalf of her daughter Melissa, a handicapped student who attends a special education class at the Seward Elementary School in Auburn, seeking relief under the Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* (EAHCA); section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and 42 U.S.C. § 1983. The plaintiff asks for declaratory and injunctive relief compelling the defendants Board of Education of the Auburn Enlarged City School District (Board of Education); Peter Kachris, Superintendent of the Auburn Enlarged City School District; and, Gordon Ambach, Commissioner of the New York State Education Department; to provide Melissa with constant nursing care while she attends public school.

Melissa is a seven-year-old child who suffers from severe physical disabilities. In order to live, she requires constant respirator assistance and a continuous supply of forty percent oxygen. All of the parties to the instant action agree that Melissa's condition requires constant vigilance by an individual trained to monitor her health. The present controversy concerns just who must provide her with this care.

Formerly, the Cayuga County Department of Social Services had provided Melissa with the services of one nurse from 7:00 a.m. until 3:00 p.m. and of a second nurse from 11:00 p.m. until 7:00 a.m. However, the Department of Social Services refused to continue paying for the services of the first nurse who accompanied Melissa to school when she began attending kindergarten in 1983. Melissa enrolled in a BOCES Option III multiply handicapped class at the Seward Elementary School upon the recommendation of the school district's Committee on the Handicapped (COH) which had classified her as "other health impaired." At that time, the Board of Education protested that it was not obligated to compensate the nurse employed to

render Melissa assistance during school hours, but it did agree to pay her until the plaintiff ascertained whether other sources of payment were available.

Upon notification by the school district that it would not shoulder the expense of extensive in-school nursing care, plaintiff requested an impartial hearing pursaunt to 20 U.S.C. § 1415(b) and the N.Y.Educ. Law § 4404(1) to review this decision. On December 14, 1984, the Hearing Officer found that the disputed nursing care did constitute "related services" within the meaning of the EAHCA. Consequently, the Hearing Officer determined that the Board of Education was indeed obligated to provide and pay for these services. The Board of Education appealed this determination. By a decision dated February 25, 1985, the New York State Commissioner of Education, Gordon Ambach, reversed the Hearing Officer's order directing the school district to "provide a suitably trained person to attend to [Melissa's] needs while [attending] a special education class." Decision of Hearing Officer, Marc Reitz, Ex. A, Defendant Ambach's Submitted Record of Appeal; Decision of New York State Commissioner of Education, Ex. F, Defendant Ambach's Record of Appeal, at p. 1. The Commissioner found that the services sought by the plaintiff were not "related services" within the meaning of the EAHCA. The plaintiff now seeks judicial review of the Commissioner's decision.

2. *Discussion*

A. *Education of All Handicapped Children Act (EAHCA).*

The Education of All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*, creates a comprehensive scheme for assuring that handicapped children receive a "free appropriate public education." 20 U.S.C. § 1401. A "free appropriate public education" includes "special education" and "related services." No state or local educational agency may receive federal funding unless it provides the handicapped with this opportunity. 20 U.S.C. § 1412(1). An individualized education program (IEP) must be developed for each handicapped child which describes the

educational needs of the child and the specially designed instruction and related services to be utilized in meeting those needs. § 1401(19). In addition, the EAHCA imposes detailed procedural requirements upon States receiving federal funds in accordance with the provisions of the Act. A parent aggrieved by the decision of a state educational agency may commence an action in either state or federal court when the disputed determination relates to the education and evaluation of the child. §§ 1415(b), 1415(e).

In accordance with the foregoing mandates, the school district's COH studied Melissa's background and developed an IEP. As noted hereinbefore, the COH recommended that she be classified as "other health impaired" and placed in a special education class for the multiply handicapped. The suggested IEP listed the particular therapies or "related services" to be rendered in connection with Melissa's educational program, including speech and language therapy, physical therapy, occupational therapy, adaptive physical education, and "*appropriate school health services.*" *See* August 29, 1983, COH Recommendation to the Board of Education, Defendant Ambach's Submitted Record of Appeal, Ex. C. The plan, however, failed to identify the specific "health support services" needed. The only question before the court is the extent to which "school health support services" are required by the EAHCA. As already noted, the Hearing Officer determined that the extensive medical care required by Melissa was encompassed within the term "related services" as set forth in the EAHCA whereas the Commissioner concluded it was not.

B. *Related Services.*

A "free appropriate public education" includes "special education and related services." § 1401(18). These related services include:

> [t]ransportation, and such developmental, corrective, and *other supportive services* (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and *medical* and counseling *services*,

> *expect that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist the handicapped child to benefit from special education,* and includ[e] the early identification and assessment of handicapping conditions in children. (emphasis added)

20 U.S.C. § 1401(17).

The Regulations, promulgated by the Department of Education, provide additional assistance in delineating the scope of the term "related services." For example, health services provided by a "school nurse or other qualified person" are specifically denoted as "related services." 34 C.F.R. §§ 300.13(a), 300.13(b)(10). Medical services are restricted, as in the statute, to those services rendered for diagnostic or evaluation purposes, and the regulations further restrict allowable medical services to those performed by a licensed physician. 34 C.F.R. §§ 300.13(a), 300.13(b)(4). Consequently, under the Regulations, therapeutic services rendered by a school nurse or "other qualified person" could qualify as "related services," but similar services performed by a licensed physician would be excluded as non-qualifying "medical services." *See Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 3377, 82 L.Ed.2d 664 (1984). These regulations are entitled to deference. *Id.*

In the instant action, the plaintiff avers that the extensive medical attention required by her daughter while in school qualifies as a "related service." An examination of the record, including the testimony of the medical personnel responsible for Melissa's care, reveals that while in school, Melissa's nurse must carry out several procedures. First, she must check Melissa's vital signs and administer medication through a tube to the child's jejunum. Moreover, she must perform a procedure known as a "P, D and C" which calls for the ingestion of saline solution by the child into her lungs; the nurse subsequently strikes her about the lungs for four minutes and then suctions out any mucus collected in her lungs. Also, the individual who accompanies Melissa must be prepared to perform cardio-pulmonary resuscitation because of complications arising from a tracheotomy.

Furthermore, Melissa is likely to suffer from respiratory distress which has been described as a life-threatening condition by her doctor. The school physician has testified that the foregoing procedures would require the services of a licensed practical nurse (LPN) or a registered nurse. Melissa's own physician has testified that the services of a school nurse would be inadequate. *See* Exs. A, B, C, and D, Defendant Ambach's Motion Papers.

The sole issues before the court are whether these services are mandated by the EAHCA as "supportive services . . . required to assist a handicapped child to benefit from special education," whether these services constitute "health services" to be provided by a school nurse or "other qualified person," or whether the foregoing services must be excluded from the definition of related services as "medical services" required for a purpose other than diagnosis or evaluation.

Before addressing the merits of the case, the court feels constrained to discuss the appropriate standard of judicial review.

C. *Standard of Judicial Review.*

The EAHCA permits an aggrieved parent to bring an action in district court. In reviewing the decision of the state educational agency,

> "[t]he court shall review the records of the administrative proceeding, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

20 U.S.C. § 1415(e)(2); *Burlington School Committee v. Department of Education,* 471 U.S. 359, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). On the basis of the record before it, the court finds that the procedural requirements imposed by the act have been observed; therefore, the court need only determine whether Melissa has been denied access to the State's educational system. In fact, we "are explicitly cautioned not to

impose a particular substantive educational standard on a State or to require equality of opportunity for handicapped children in education." *Karl v. Board of Education of Geneseo C. School District*, 736 F.2d 873, 876 (2d Cir. 1984) (citing *Board of Education v. Rowley*, 458 U.S. 176, 191-203, 102 S.Ct. 3034, 3043-3049, 73 L.Ed.2d 690); *accord Council for the Hearing Impaired v. Ambach*, 610 F.Supp. 1051 (E.D.N.Y. 1985). Consequently, the court must determine whether the services enumerated above qualify as "supportive services" necessary for Melissa to "benefit from instruction." *See Rowley*, 458 U.S. 176, 102 S.Ct. 3034. If they are, then the school district and the board of education must provide and pay for them unless they fall within the exclusion for therapeutic medical services.

D. *EAHCA Claim – Irving Independent School District v. Tatro Decision: Supportive Services or Medical Services?*

The defendants have moved for summary judgment asking the court to hold that the medical care in question does not constitute a "related service" within the meaning of the EAHCA. It is their position that although the disputed services do not necessarily entail the presence of a physician, they are essentially medical in nature, and, therefore, must be excluded under § 1401(17) as medical services of a therapeutic nature. The evidence before the court indicates that the care required by Melissa should be administered by a LPN or registered nurse and that the availability of a school nurse is inadequate. The defendants urge this court to ignore the technical distinction in the Regulations which would exclude therapeutic services when performed by a physician but would not exclude services of this type when performed by a school nurse or other qualified person. Essentially, the defendants' argument is that the question of whether a supportive service is a medical service is a matter of degree. They ask the court to consider the type of service required as the crucial element in determining which category encompasses it, not the status of the person performing the task.

Plaintiff, on the other hand, cross-moves for summary judgment, and asks the court to hold that, as a matter of law, the

disputed services constitute "supportive services ... required to assist [Melissa] to benefit from special education." Plaintiff claims that because the procedures required may be performed by a qualified person, other than a physician, they constitute "school health services," and do not fall within the exclusion for therapeutic medical services enunciated in the EAHCA and the regulations promulgated thereto. In contrast to the defendants' argument, the plaintiff focuses entirely on the qualifications of the person performing the service and rejects any distinction based upon the character of the service.

In the leading case of *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984), the Supreme Court construed the EAHCA and its implementing regulations. In *Tatro*, the Court held that the provision of clean intermittent catheterization (CIC) was a "supportive service" within the terms of the Act. In that case, petitioner was an eight-year-old child born with spina bifida. The child suffered from speech impairments and a bladder dysfunction which required her to be catheterized every four hours in order to avoid renal injury. The procedure was described as a simple one which the child would soon be able to perform herself. Consequently, the Court ruled that the CIC was indeed a "supportive service ... required to assist a handicapped child to benefit from special education." *Id.*, 104 S.Ct. at 3376. The Court also determined that the provision of CIC did not constitute an excluded medical service. Accordingly, the inquiry of this court must be two-fold: first, do the services in question qualify as "supportive services" and second, do they fall within the "medical services" exclusion?

In *Tatro*, the Supreme Court analogized "supportive services" to services which enable a child to remain at school during the day. *Id.* at 3377. Such services provide the child with meaningful access to the education envisioned by Congress. *Id.* The CIC was characterized as a service which was "no less related to the effort to educate than services that enable[d] the child to reach, enter, or exit the school." *Id.; see also Tokarcik v. Forest Hills School School District*, 665 F.2d 443 (3d Cir. 1981) *cert. denied sub nom Scanlon v. Tokarcik*, 458 U.S. 1121, 102 S.Ct.

3508, 73 L.Ed.2d 1383 (1982) (finding CIC a related service); *State of Hawaii Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *cert. denied*, —U.S.—, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985) (finding repositioning of suction tube in child's throat a related service). In the case at bar, provision of the disputed services would undoubtedly enable Melissa to attend school during the day. The parties admit that without this attention, Melissa must receive only in-home instruction. However, it does not necessarily follow that because Melissa can attend school only with the assistance of these services, they must be provided by the school board.

The instant case is decidedly different from the situation presented in *Tatro*. The care essential for Melissa's well-being is complicated and requires the skill of trained health professionals. In its analysis, the Supreme Court recognized that although meaningful access to education must be afforded handicapped children, medical services which would entail great expense are not required. In construing the "medical services" exclusion, the Court determined that the Secretary of Education had reasonably interpreted § 1401(17) by concluding that Congress had intended to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence," and upheld the limitation of the "medical services" exclusion to the services of a physician or hospital which, it noted, were far more expensive than school nursing services. The Court found, therefore, that the administration of CIC was a permissible school nursing service.

It is clear that the Supreme Court considered the extent and nature of the service performed in the *Tatro* decision. Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant monitoring is required in order to protect Melissa's very life. The record indicates that the medical attention required by Melissa is beyond the competence of a school nurse. A specially trained individual is required, preferably a health professional. The Supreme Court, in *Tatro*, reasoned that the regulations had permissibly interpreted § 1401(17) in providing that school

nursing services did not fall within the medical services exclusion. In so doing, the Court stated that Congress could well have decided to exclude costly and complicated services. *Id.*, 104 S.Ct. at 3778. Indeed, the Court noted that "children with serious medical needs are still entitled to an education. For example, the Act specifically includes instruction in hospitals and at home within the definition of 'special education.' " *Id.* at n.11. This dictum is in line with the Court's earlier decision in *Rowley* wherein it held that Congress did not intend to "maximize each handicapped child's potential." *Id.*, 458 U.S. at 199, 102 S.Ct. at 3047 (holding that Act did not require provision of a sign language interpreter for a deaf child enrolled in public school).

In light of the foregoing, the court holds that the EAHCA does not require the defendants school district and board of education to provide a severely physically disabled child with constant, in-school nursing care. As recognized in the *Tatro* decision, the "medical services" exclusion evidences Congress' concern that schools might otherwise be subjected to excessive costs and the burden of health care. On the other hand, simple school nursing services do not similarly burden the schools, and, therefore, are permissible under § 1401(17) of the EAHCA. In the case at bar, the services in question do not fall squarely within the terms of the "medical services" exclusion because they need not be performed by a physician, nor do they qualify as simple school nursing services. *See Tatro* (finding the CIC a simple procedure which did not even require the services of a nurse). The extensive, therapeutic health services sought by the plaintiff on behalf of her daughter more closely resemble the medical services specifically excluded by § 1401(17) of the EAHCA. Even though they do not fulfill the "physician" requirement set forth in 34 C.F.R. 300.13(b)(4), the exclusion of the disputed services is in keeping with its spirit. Furthermore, the *Tatro* decision does not require the provision of all health services, regardless of their magnitude, if performed by one other than a physician. The Supreme Court held only that school nursing services of a simple nature are not excludable as therapeutic "medical services."

For the reasons adduced above, the court grants the defendants' motion for summary judgment dismissing the plaintiff's

claim that the failure to provide the services enumerated hereinbefore constitutes a violation of § 1401(16), (17) and (18) of the EAHCA. Consequently, plaintiff's motion for summary judgment is denied.

E. *Rehabilitation Act and § 1983 Claims.*

The plaintiff's claims brought pursuant to the Rehabilitation Act and 42 U.S.C. § 1983 must be dismissed. The EAHCA constitutes her exclusive form of relief. *See Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).[1]

F. *Pendent State Claims.*

All pendent state claims asserted by the plaintiff are dismissed.

The complaint in its entirety is dismissed.

IT IS SO ORDERED.

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[1] The court recognizes that *Robinson* left open the question whether such a claim would be precluded by the EAHCA. *Id.* at n. 17. However, the court finds that plaintiff was accorded due process.

Order of this Court Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-190

MELISSA DETSEL, BY NEXT FRIEND MARY JO DETSEL,

Applicant,

v.

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, ET AL.,

Respondents.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 13, 1987.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 3rd

day of September, 1987.

Statutory and Regulatory Provisions Involved

STATUTORY AND REGULATORY PROVISIONS

United States Code

Title 20

§ 1401 (17) Definitions.

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

* * *

§ 1412 (5) Eligibility requirements.

The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

Code of Federal Regulations

Title 34

§ 300.13 Related services.

* * *

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

* * *

(b) The terms used in this definition are defined as follows:

* * *

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

* * *

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

* * *

Least Restrictive Environment

§ 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§ 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

Comment. Section 300.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104—Appendix, Paragraph 24) includes several points regarding educational placements or handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * * ."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 300.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

Comment. Section 300.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be

provided opportunities for participation with other children." (34 CFR Part 104—Appendix, Paragraph 24.)

§ 300.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 300.550 is effectively implemented.

Comment. Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 300.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 300.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

§ 300.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

No. 87-615

IN THE

Supreme Court of the United States

October Term, 1987

MELISSA DETSEL, an infant by her Mother and next friend, MARY JO DETSEL,

Petitioner,

vs.

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, PETER KACHRIS, individually and as Superintendent of the Auburn Enlarged City School District, GORDON AMBACH, Commissioner of the New York State Education Department,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Did the Court of Appeals for the Second Circuit err in concluding that the Education of the Handicapped Act does not impose upon boards of education the obligation to provide one-to-one full-time skilled nursing services to a child with a handicapping condition who requires such services during the school day?

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IN THE

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October Term, 1987

No. 87-615

MELISSA DETSEL, an infant by her mother and next friend, MARY JO DETSEL,

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BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, PETER KACHRIS, individually and as Superintendent of the Auburn Enlarged City School District, GORDON AMBACH, Commissioner of the New York State Education Department,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Commissioner of the New York State Education Department respectfully requests that this court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Second Circuit in this case. That opinion is reported at 820 F2d 587 (1987).

Statement of the Case

This is an action commenced in the United States District Court for the Northern District of New York pursuant to the Education of the Handicapped Act (EHA), 20 USC §§1400 *et seq.*, in which petitioner seeks to set aside a decision of respondent New York State Commissioner of Education rendered pursuant to 20 USC §1415(c) and holding that respondent Board of Education of the Auburn Enlarged City School District was not obligated by the EHA to provide skilled nursing services to the infant petitioner during the time each school day when she attends an instructional program provided by the board of education.

Melissa Detsel is a nine year old girl with numerous health problems, including diaphragmatic hernia and hypoplastic right lung, patent ductus arteriosis, pulmonary hypertension, border-line congestive heart failure, pulmonary fibrosis with ventilator dependency, scoliosis, club feet, abnormal functioning of the gastro-intestinal system caused by a gastro-esophageal reflux and undernutrition. She is fed and receives medication through a gastrostomy, and she requires one-to-one attention by a registered or licensed practical nurse who is specially trained in respiratory care management.

In July 1983, she was referred to the committee on the handicapped (COH) of respondent board of education, which has the responsibility of recommending to the board of education an appropriate educational placement for each handicapped child of school age residing within the district, pursuant to New York State Education Law §4402(1)(b)(3). The COH identified Melissa as "other health impaired" and recommended placement in an Option III class operated by a board of cooperative educational services (BOCES) at defendant board's

Seward School in Auburn. The COH recommended that Melissa receive speech/language therapy, physical therapy, occupational therapy, adaptive physical education and appropriate, but unspecified, school health support services.

Respondent board of education approved the COH recommendation, and Melissa attended kindergarten in the Option III program for two hours each morning during the 1983-84 school year. The Cayuga County Department of Social Services, which had provided the services of one nurse from 7:00 a.m. until 3:00 p.m. and of a second nurse from 11:00 p.m. until 7:00 a.m., declined to pay for the services of the first nurse who accompanied Melissa to school, allegedly because the regulations governing the Medicaid program precluded that agency from paying for the nurse's services while the child was in school. Respondent board asserted that it was not responsible for payment of the nurse's salary, but agreed to pay for such services while the board and Mary Jo Detsel, Melissa's mother, ascertained whether other sources of payment were available.

An annual review of Melissa's program was conducted by the COH on May 9, 1984, and the COH recommended that her handicapping condition be changed to "multiply handicapped," but that she continue to attend the BOCES Option III class with speech, physical and occupational therapies during the 1984-85 school year. The Phase I individualized education plan embodying the COH recommendation indicated that appropriate school health services were to be provided, but did not identify specific services.

Upon notification from the district that it would not pay for the child's nursing services, Mary Jo Detsel requested an impartial hearing in accordance with the provisions of 20 USC §1415(b)(2) and its State counterpart, Education Law §4404(1). The district agreed to pay for the child's nursing services in the interim.

In a decision dated December 14, 1984, the hearing officer found that the nursing services were "supportive services" inextricably related to Melissa's opportunity to receive an education in the least restrictive environment, and concluded that respondent board of education was obligated to provide such services as a component of the student's right to a free appropriate public education secured by the Education of the Handicapped Act.

The board of education sought review of the hearing officer's decision in an appeal to respondent New York State Commissioner of Education. By decision dated February 25, 1985, the Commissioner annulled the decision of the hearing officer, and directed that the COH immediately make provision for home instruction for Melissa while petitioner sought administrative review of the refusal of the Cayuga County Department of Social Services to pay for Melissa's nursing services while she attends school.

This action was commenced against respondent board of education and respondent Kachris. Respondent Ambach, who left office as Commissioner of Education of the State of New York on June 30, 1987, was added as a defendant to this action by service of an amended complaint in May, 1985. Respondent board's motion for permission to serve a third party complaint upon Cesar A. Perales, New York State Commissioner of Social

Services, was denied by the District Court on September 24, 1985. On June 19, 1986, the District Court granted defendants' motion for summary judgment, dismissing the complaint in its entirety, upon a finding that the EHA does not require respondent board of education to provide petitioner with the constant nursing care which she requires while she is in attendance at school.

In a *per curiam* decision dated June 12, 1987, the United States Court of Appeals for the Second Circuit dismissed petitioner's appeal from the judgment of the District Court, finding that the District Court had given proper effect to the statutory scheme in balancing the interests of the parties.

REASONS FOR DENYING THE WRIT

The decision below is consistent with the EHA, with the decisions of this Court and with the decisions of other circuits, and provides useful and appropriate criteria upon which to determine a child's eligibility for related services.

A. The applicable provisions of the EHA do not require the provision of skilled nursing services.

Petitioner asserts that this case presents an important issue as to the construction of a Federal statute and is therefore appropriate for review by this Court. Although petitioner attempts to support this assertion by characterizing the Second Circuit's decision as "novel" or at variance with decisions by this Court or other Circuit Courts of Appeals, we respectfully submit that the District Court and the Second Circuit did nothing more than apply the provisions of the EHA to the specific facts in this case.

The EHA requires that each child with a handicapping condition receive a "free appropriate public education" (20 USC §1412 [1] and [2][B]), which must include special education and related services (20 USC §1401[a][18]).

> "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." 20 USC §1401(a)(17).

Although the definition of related services is fairly expansive, it is qualified by the general requirement that a particular service must be necessary to assist a child to benefit from instruction, and by the very specific limitation upon the provision of medical services by a board of education. Medical services need only to be provided for the purpose of diagnosis and evaluation, which in the context of the statute clearly refers to ascertaining the nature and extent of a handicapping condition which impacts upon a student's ability to learn. It was never intended that boards of education should generally assume the responsibility of parents and/or other public agencies for the treatment and maintenance of individuals afflicted with various medical conditions, as the statute clearly reveals.

Petitioner correctly points out the clear preference expressed in the EHA for a special education placement in the least restrictive environment appropriate to address the individual needs of a child with a handicapping condition (20 USC §§1412[5][B] and 1414[a][1][C][iv]). That preference does not, however, require that any and all services which would enable a child to attend instruction in a less restrictive environment be provided by a board of education; boards are required to provide only those services which fall within the definitions of "special education" and "related services."

The Federal regulation defining "related services," 34 CFR §300.13, also indicates that the term includes "medical services for diagnostic or evaluation purposes" (34 CFR §300.13[a]), and defines medical services as "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and

related services" (34 CFR §300.13[b][4]). The regulation further provides that "related services" also include "school health services, social work service in schools, and parent counseling and training" (34 CFR §300.13[a]). "School health services" are defined as "services provided by a qualified school nurse or other qualified person" (34 CFR §300.13[b][10]).

Respondent Commissioner of Education submits that the nursing service involved in this case is not a related service, and need not be provided by respondent board of education as part of a free appropriate public education. The definition of "related services" in the EHA is structured in such a way that it includes "medical services" insofar as those services are for diagnosis and evaluation. Because the regulations implementing the EHA place upon the definition of "medical services" the further gloss of limiting such services to those provided by a licensed physician, petitioner argues that any health care service which is provided by an individual other than a physician must be provided by a board of education so long as it enables a child with a handicapping condition to attend school.

Petitioner's argument skips a vital step. All parties agree that the skilled nursing services required by Melissa do not constitute diagnostic or evaluative medical services which must be provided under the EHA. To qualify as related services, it is still necessary, however, to identify a specific category of related services within which the skilled nursing services fall. Looking to the applicable statutory (20 USC §1401[a][17]) and regulatory [34 CFR §300.13] provisions, the regulatory category of "school health services" (34 CFR §300.13[a] and [b][10]) appears to be the category closest to including the services required by Melissa. However,

"school health services" are defined as "services provided by a qualified school nurse or other qualified person" (34 CFR §300.13[b][10]). As discussed below, the specialized skilled nursing services required by Melissa are well beyond the expertise of a school nurse or other school personnel. Thus it appears that the nursing services required by Melissa do not fall within any of the categories of services specifically required to be provided under the EHA and its implementing regulations.

B. The decision below is entirely consistent with the analysis applied by this Court in *Tatro*.

In *Irving Independent School District v. Tatro*, 468 US 883 (1984), this Court construed the aforementioned statutory and regulatory provisions in holding that a board of education was obligated to provide the procedure of clear intermittent catheterization (CIC). The Court concluded that a simple procedure like CIC, which can be performed in a few minutes by a lay person with less than an hour's training, was not a medical service because it need not be performed by a licensed physician. As noted by the District Court in reasoning adopted by the Court of Appeals, the instant case is factually different from and the result herein consistent with the *Tatro* decision (*Detsel v. Board of Education*, 637 F Supp 1022 [N.D.N.Y. 1986], at 1026-1027 [pp. 11a-12a of the appendix to the petition herein]).

In upholding the authority of the U.S. Secretary of Education to require boards of education to provide appropriate school health services, this Court noted that school nurses have long been a part of the educational system, and found that the Secretary could reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as "medical

services" in the statutory definition of related services. Implicit in the Court's reasoning is a belief that an occasional, simple health procedure such as CIC is no different in occurrence or scope than the services which are typically provided in a school health program, *e.g.* taking temperatures, treating minor cuts and bruises, taking health histories, administering simple eye tests. The Court specifically noted that,

> "Nurses in petitioner School District are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provisions of CIC to the handicapped. It would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped." *Tatro, supra* at 893-894.

Melissa however requires health services which are neither routine nor infrequent. During the time that she is in school, the nurse (1) checks her vital signs—temperature and respiration rate, (2) administers medication through a tube to the girl's jejunum, (3) administers a "P.D. and C.", which involves having the girl ingest 2 c.c.'s of saline solution into her lungs, striking her very hard around the lungs for 2 minutes on each side to loosen the mucus in her lungs, and suctioning the mucus from her lungs. The nurse must also be prepared at all times to administer a special form of cardiopulmonary resuscitation, because of the tracheostomy, and Melissa's attendant must have had experience treating respiratory disease. When the child becomes frightened or upset she may become cyanotic, *i.e.* turn blue, in which case immediate treatment is required in order to save her life.

Melissa's health needs require attention by a registered or licensed practical nurse who is specially trained in respiratory care management, and having a school nurse on call to respond to Melissa's respiratory distress would not be adequate. The services she requires are clearly therapeutic in nature, involving treatment for a life threatening condition, and are not simply for purposes of diagnosis and evaluation. It was conceded by petitioner that the health services required by Melissa cannot be provided by a regular school nurse.

In essence, Melissa requires sophisticated therapeutic care on a constant basis. Although the Federal regulation defines medical care in terms of services which must be performed by a licensed physician, respondent Commissioner believes that it is overly simplistic to classify a particular service as either "related" or not "related" solely by reference to the professional license required by individual states to perform that service, and it is submitted that this Court established no such test in *Tatro.*

Instead of focusing simply on the professional license held by the person providing a particular service, this Court in *Tatro* clearly considered the nature of the service in the context of the kinds of health services which educational institutions have traditionally provided (*Irving Independent School District v. Tatro, supra* at pp. 893-894). As this Court noted in *Board of Education, Hendrick Hudson School District v. Rowley,* 458 US 176 at 190, Congress did not intend to impose upon states "a burden of unspecified proportions and weight[;]" rather the EHA was enacted to increase Federal funding to assist states in meeting the goal of providing full educational opportunities for handicapped children. Congress devoted little discussion to the

medical services exception to the statutory definition of related services. Absent explicit evidence to the contrary, it is logical to conclude that Congress did not intend that school districts should assume financial responsibility for the provision of medical services which have heretofore been the responsibility of parents and other public agencies.

In *Tatro*, this Court concluded that the EHA provided the Secretary of Education with the authority to require local educational agencies to provide school health services, and that, in the circumstances presented, CIC constituted such a service. The Court did not require local educational agencies to provide any and all services which could be provided by a health practitioner other than a doctor. We respectfully submit that the extensive therapeutic services required by Melissa Detsel are not school health services, and that nothing in this Court's decision in *Tatro* requires or supports a contrary conclusion.

C. The decision below is consistent with both the decision of the Ninth Circuit Court of Appeals and the reasoning followed therein.

Petitioner seeks to oversimplify the analysis used by the U.S. Court of Appeals for the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F2d 809 (9th Cir. 1984), affg in part 531 F Supp 517, cert den 471 US 1117 (1985), for the purpose of establishing an alleged conflict between the holding in that decision and the holding of the Second Circuit in this case. Although there are similarities between the facts of that case and the case now before the Court, there are also significant factual differences. Clearly the most significant factual differences are that the services required by *Katherine D.*

could be performed by a lay person (*supra*, 727 F2d 809, footnote 6 at 815; 531 F Supp 517, at 526), rather than the health professionals which Melissa requires, and that Katherine did not require a full-time attendant whose sole function was to monitor her condition and treat her as necessary. Thus, the services required by *Katherine D.* could be characterized as school health services which could be performed on an incidental basis by regular school staff. In contrast, the services required by Melissa are not school health services and cannot be performed by regular school staff.

Moreover, the Ninth Circuit simply did not use the "bright line" test ascribed to it by petitioner. To the contrary, that Court, at page 813, specifically recognized the balancing of concerns that is inherent in the EHA by requiring the Hawaii Department of Education

> "to make only those efforts to accommodate Katherine's needs that are 'within reason'. *Tokarcik v. Forest Hills School District*, 665 F2d 443, 455 (3d Cir. 1981), cert den 458 US 1121 (1982)."

The Ninth Circuit further noted in reaching its decision that the services required by Katherine "could have been made available without unduly burdening the school system" (*supra*, at 815). Thus, it appears that the Ninth Circuit recognized that the balancing of certain interests is necessary in determining the obligation of a local educational agency to provide a particular service, and more specifically in determining whether a particular service comes within the regulatory definition of a "school health service."

D. The analysis used by the Court below will not result in either inconsistent results or protracted litigation.

Petitioner argues that the analysis used by the Court of Appeals for the Second Circuit in this case will lead to inconsistent results and to protracted litigation. In the first place, it must be noted that petitioner has made no showing that either is likely to occur. Furthermore, we submit that consistency of results should not take precedence over the proper and intended implementation of the EHA.

Furthermore, with respect to petitioner's claim that inconsistent determinations will result from an examination of the nature of services required by a child, it does not appear that any such inconsistency has actually occurred. In cases involving intermittent routine care which could be performed by a regular school nurse, the courts have concluded that such services are school health services which must be provided under the EHA (*Irving Independent School District v. Tatro, supra; Department of Education v. Katherine D., supra; Tokarcik v. Forest Hills School District,* 665 F2d 443 [3d Cir. 1981], cert den 458 U.S. 1121 [1981]). On the other hand, when "private duty" nursing services are required to serve the extensive medical needs of a student, the courts have concluded that such services are not school health services and need not be provided by local educational agencies (*Detsel v. Board of Education,* 820 F2d 587 [2d Cir. 1987], affg 637 F Supp 1022 [NDNY 1986]; *Bevin H. v. Wright,* 666 F Supp 71 [W.D.Pa. 1987]). Although it may not always be easy to determine whether the services required by a particular child are school health services, the resolution of that issue is not so difficult that it is outside the range of expertise of the local and State education officials charged with making such determinations or of judges in reviewing those determinations.

Accordingly, we submit that the decision of the Court below is not likely to lead to inconsistent results or protracted litigation in the future.

Conclusion

For the foregoing reasons, respondent Commissioner of Education of the State of New York respectfully requests that the petition for the writ of certiorari be denied.

Dated: Albany, New York
November 6, 1987

Respectfully submitted,

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No. 87-615

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MELISSA DESTEL, an infant by her mother and next friend, MARY JO DETSEL,

Petitioner,

vs.

BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, PETER KACHRIS, individually and as Superintendent of the Auburn Enlarged City School District, GORDON AMBACH, Commissioner of the New York State Education Department,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the respondents are not required, under the Education for All Handicapped Children Act, to provide petitioner with constant, life-sustaining, therapeutic care while she attends school.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, Board of Education of the Auburn Enlarged City School District ("School District") and Peter Kachris, respectfully pray that the Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals

for the Second Circuit. That decision affirmed the order of the United States District Court for the Northern District of New York granting respondents' summary judgment and dismissing petitioner's complaint.

COUNTERSTATEMENT OF THE CASE

This case involves the propriety of the School District's determination that it is not obliged under the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* ("EAHCA"), to provide myriad life-sustaining, therapeutic medical services to a young multiply handicapped girl. Both the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit have concluded that the School District has no such obligation.

1. *Statement of Facts*

The petitioner, Melissa Detsel ("Melissa"), is a severely handicapped child whose multitude of complex medical problems require constant life-sustaining care of a sophisticated nature.[1] Since 1983, she has attended a class for multiply handicapped children at an elementary school in the School District. During this time, a licensed practical nurse has been constantly attending to Melissa's extraordinary medical needs. This skilled health professional must be with Melissa virtually every moment that she is in school. It is imperative that this nurse be continuously ready and able to respond immediately should Melissa experience respiratory or congestive heart failure. Additionally, this profes-

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[1] Melissa's extensive medical problems include pulmonary hypertension, borderline congestive heart failure, pulmonary fibrosis with ventilator dependency, scoliosis, club feet, gastroesophageal reflux and chronic undernutrition.

sional must regularly suction Melissa's lungs, administer medication through Melissa's jejunum tube, and continuously supply her with oxygen.

Quite plainly, the care which Melissa's condition requires cannot be provided by anyone except a trained, experienced health-care professional. Her numerous and complicated medical needs simply cannot be met by a school nurse who must care for many other students, a point which both Melissa's nurse and pediatrician concede.

Until Melissa entered school in 1983, her medical care was paid for by the New York State Department of Social Services ("DSS"). Once she started school, however, DSS abruptly and inexplicably refused to continue this practice.[2] The School District also refused to pay for petitioner's medical care, but, while this action is pending, has been paying for that care under protest.

2. *Proceedings Before the District Court and the Court of Appeals*

On the foregoing facts, the United States District Court for the Northern District of New York (Hon. Neal J. McCurn) carefully reviewed and applied this Court's decision in *Irving Independent School District v. Tatro,* 468 U.S. 883 (1984) ("Tatro") and granted the respondents' motion for summary judgment dismissing the petitioner's complaint, including her claim that respondents' refusal to provide her with constant nursing care violated

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[2] Petitioner has neglected to mention that there is an action pending against the DSS in the United States District Court for the Northern District of New York by which she seeks to hold DSS financially responsible for her medical services during school hours.

the EAHCA.[3] (Appendix to Petition, pp. 3a-13a). In a *per curiam* opinion, the United States Court of Appeals for the Second Circuit concluded that "the complaint was properly dismissed for the reasons stated in the opinion of the district court."[4] (Appendix to Petition, pp. 1a-2a).

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION THAT THE EAHCA DOES NOT REQUIRE THE SCHOOL DISTRICT TO PROVIDE PETITIONER WITH CONSTANT, LIFE-SUSTAINING THERAPEUTIC CARE WHILE SHE ATTENDS SCHOOL IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS IN *ROWLEY* AND *TATRO*.

This Court twice has considered the duty to provide handicapped children with a "free appropriate public education" under the EAHCA. In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Court decided that a school district was not required to provide a deaf student with a qualified sign-language interpreter in all her academic classes as part of a free appropriate public education. Rejecting the argument that the EAHCA requires participating school districts to "maximize the potential

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[3] Petitioner's complaint also asserted claims based upon alleged violations of Section 504 of the Rehabilitation Act, the Civil Rights Act of 1871, the Fourteenth Amendment of the United States Constitution and Article 89 of the New York Education Law. The petition for writ of certiorari does not dispute the dismissal of these claims.

[4] Quite disingenuously, petitioner has suggested that the court of appeals rendered its decision without considering *Tatro* (*See* Petition for Writ of Certiorai, p. 7). This is completely inaccurate. The court of appeals based its affirmance on the district court's opinion which includes an exhaustive and careful analysis of this Court's decisions in both *Board of Education v. Rowley,* 458 U.S. 176 (1982), and *Tatro, supra.*

of handicapped children," the Court held that a school district satisfies its duties under the EAHCA when it provides handicapped children with personalized instruction and sufficient support services to permit them to benefit educationally from that instruction. *Rowley,* 458 U.S. at 190, 204.

More recently, the Court, in *Irving Independent School District v. Tatro,* 468 U.S. 883 (1984), considered whether clean intermittent catheterization ("CIC") qualified as a related service which must be provided handicapped children as part of a free appropriate public education. CIC involves the insertion of a catheter into the urethra every three or four hours to drain the bladder and avoid injury to the kidneys. 468 U.S. at 885. It is a simple procedure that may be performed in a few minutes by a layperson. *Id.* Indeed, with "less than an hour's training" an individual can become proficient enough to administer CIC. *Id.* Emphasizing that CIC was not more burdensome than services provided nonhandicapped students by a school nurse, the Court concluded that it was a "related service" which the school district was obligated to provide under the EAHCA. 468 U.S. at 893-895.

Applying the principles which this Court enunciated in *Rowley* and *Tatro*, the district court concluded, and the court of appeals agreed, that the constant professional care that Melissa requires is not a "related service" which must be provided under the EAHCA as part of a "free appropriate public education." Melissa requires continuous, not intermittent, care. The failure to monitor her condition continuously would jeopardize her life. Moreover, a school nurse, who is responsible for the health needs of other students, cannot provide her with the incessant and exclusive vigilance which Melissa's extensive physical problems demand. Indisputably, Melissa's complicated medical care cannot be provided by a trained layperson; only an experienced, licensed professional is capable of meeting Melissa's critical needs. On these facts, the district court and the court of appeals correctly

determined that the EAHCA does not require the School District to provide Melissa with a personal nurse to provide the constant medical attention she requires.

Petitioner's assertion that the Second Circuit's decision undermines the statutory "mandate" to educate petitioner with children who are not handicapped is meritless. It is sheer speculation to assume that petitioner will not secure another source of funding to pay for the medical care which she requires, particularly when her action to compel DSS to pay for these services is still pending. More importantly, the EAHCA contemplates that regular classrooms may not be a suitable setting for educating many handicapped children. Although the EAHCA articulates a preference for mainstreaming handicapped children, "[t]he Act expressly acknowledges that 'the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.' " *Board of Education v. Rowley,* 458 U.S. at 181 n.4. Thus, assuming that Melissa will, in the future, be educated in her home, it is clear that the School District nevertheless will satisfy its obligation to provide her with a "free appropriate public education" by offering her "personalized instruction and sufficient support services to permit her to benefit educationally from that instruction." *Board of Education v. Rowley,* 458 U.S. at 203. In these circumstances, it is clear that the district court and the court of appeals reached the correct albeit difficult decision.

II. THE "APPARENT CONFLICT" WHICH PURPORTEDLY EXISTS BETWEEN THE DECISIONS OF THE SECOND AND NINTH CIRCUITS IS ILLUSORY AND PREDICATED UPON PETITIONER'S DISTORTED READING OF THOSE DECISIONS.

The Second Circuit concluded its *per curiam* opinion, which affirmed both the reasoning and the conclusion of the district court, by observing that "the district court gave proper effect to the statutory scheme [of the EAHCA] in balancing the interests of the parties." (Appendix to Petition, p. 2a). Extending the significance of these concluding remarks without basis and beyond any principled construction, petitioner postulates that the Second Circuit adopted a novel and impermissible "balancing" test. Petitioner then argues that review by this Court is necessary to resolve an "apparent conflict"[5] between the Second Circuit's analysis in this case and the so-called "bright-line" test[6] enunciated by the United States Court of Appeals for the Ninth Circuit in *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983). Petitioner contends that the Ninth Circuit's inflexible "bright-line" test requires school districts to provide handicapped children with therapeutic medical treatment unless that treatment is provided by a physician.

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[5] Unwilling to test the limits of incredulity by alleging an "actual" conflict between the decisions of the Second and Ninth Circuits, petitioner suggests that review by this Court nevertheless is warranted to review an "apparent" conflict between those decisions. Any conflict between these decisions is apparent only to petitioner and premised upon a distorted interpretation of these cases.

[6] The phrase "bright-line" test is petitioner's own and will not be found in the Ninth Circuit's opinion in *Katherine D.* Petitioner's facile attempt to mold the decisions of the Second and Ninth Circuits into a position of conflict belies the existence of any real conflict deserving of this Court's attention. This so-called "bright-line" test is illogically rigid and seriously flawed. For example, even CIC would not be a related service under this test if administered by a physician.

Preliminarily, it is clear from the decisions of this Court and the decisions of the federal courts of appeals that the precise contours of a "free appropriate public education" must be determined on a case-by-case basis by considering all of the pertinent facts and circumstances. Indeed, this Court has held that the duty to provide a "free appropriate public education" is so complex that satisfaction of that duty cannot be measured by any litmus test or formula. *Board of Education v. Rowley,* 458 U.S. at 199-200. In rejecting the notion that the EAHCA requires participating school districts to provide handicapped children with opportunities and services equal to those offered nonhandicapped children, this Court has observed:

> The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. . . . The theme of the [EAHCA] is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

Rowley, 458 U.S. at 199-200. Thus, a "balancing of the interests of the parties" is clearly contemplated when preparing an individualized program of instruction for a handicapped child that will afford that child a "free appropriate public education."

Certainly *Katherine D.* does not stand for anything to the contrary. The Ninth Circuit did not adopt a "bright-line" test in *Katherine D.* to determine the level of medical treatment which must be afforded handicapped children as part of a "free appropriate public education." In that case, a handicapped child, suffering from cystic fibrosis and tracheaomalacia, wore a tracheostomy tube which allowed her to breath and expel mucous secretions from her lungs. 727 F.2d at 812. The child's physical condition required that her lungs be suctioned just two or three times a day and that her tracheostomy tube be replaced should it become dislodged. *Id.* In significant contrast to the care which petitioner demands, the care which Katherine D. needed could be performed intermittently by a trained layperson (*i.e.*, her teachers). *Id.* The Ninth Circuit therefore determined that these were "related services" which the school district was obligated to provide under the EAHCA. *Id.* at 815.

In reaching this conclusion, the Ninth Circuit reiterated this Court's admonition that Congress did not intend a broad interpretation of the term "free appropriate public education" that would require school districts to maximize each handicapped child's potential. *Katherine D.*, 727 F.2d at 813 (*citing Board of Education v. Rowley,* 458 U.S. at 198). The Ninth Circuit observed:

> Noticeably absent from the [EAHCA] is any requirement that [participating states] provide the best possible education for the eligible handicapped child. Because budgetary constraints limit resources that realistically can be committed to these special programs the [state] is required to make only those efforts to accommodate Katherine's needs that are "within reason."

Katherine D., 727 F.2d at 813. *See also Tokarcik v. Forest Hills School District,* 665 F.2d 443, 455 (3d Cir. 1981), *cert. denied,* 458 U.S. 1121 (1982) (related services include what is required

"within reason" to make a regular classroom setting possible for a handicapped child who can benefit from it). With these principles in mind and after considering the nature and extent of the care at issue, the Ninth Circuit decided that Katherine D.'s uncomplicated physical needs could reasonably be accommodated in a regular classroom "without unduly burdening the school system" and that the school district was obligated to provide that care under the EAHCA. *Katherine D.*, 727 F.2d at 815.

Petitioner's contention that the Ninth Circuit adopted a "bright-line" test in *Katherine D.* which requires school districts to provide handicapped children with skilled nursing services and medical care subject only to the limitation that this care not be administered by a physician is simply not true. While the Ninth Circuit recognized that the regulations of the United States Department of Education[7] exclude "services provided by a licensed physician" from the definition of "related services," this clearly was not the determinative factor in its opinion. Indeed, if the Ninth Circuit had intended to enunciate a "bright-line" test as petitioner contends, it could and would have issued an abbreviated decision to that affect without examining the complexity and extent of the medical care which that handicapped child required.

The different results which the Second Circuit reached in this case and the Ninth Circuit reached in *Katherine D.* are attributable to the compelling differences between the medical attention which the students required and not to any doctrinal differences in the legal analysis which the courts applied. Petitioner's handicaps are far more severe and her medical needs commensurately more complicated than those faced by Katherine D. Thus, the "apparent conflict" which petitioner perceives between the decisions of these courts is illusory and need not be addressed by this Court.

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[7] 34 C.F.R. §300.13.

CONCLUSION

For the above reasons, respondents respectfully pray that the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit be denied.

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NO. 87-615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MELISSA DETSEL, et al.,
Petitioner,
v.
BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR ADVOCACY, INC., S.K.I.P. OF NEW YORK AND S.K.I.P. OF TEXAS IN SUPPORT OF PETITIONER MELISSA DETSEL

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On the Brief
REED MARTIN

November 12, 1987

NO. 87-615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MELISSA DETSEL, et al.,
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ENLARGED CITY SCHOOL DISTRICT, et al.,
Respondents

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE

Advocacy, Incorporated, S.K.I.P. of New York and S.K.I.P. of Texas, as amici curiae in the accompanying proposed brief, hereby move the Court, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, for leave to file the proposed brief amici curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The ground for this motion is that Advocacy, Inc., S.K.I.P. of New York and

S.K.I.P. of Texas have a direct and immediate concern regarding the denial to students with handicaps of school health services in the least restrictive environment as required by federal statutes and regulations. Amici work with and advocate for children like Petitioner and wish to file the attached proposed brief.

Advocacy, Inc., has obtained written consent from the Petitioner, Melissa Detsel, which has been filed with the Clerk of this Court. Advocacy, Inc., has also requested written consent from Respondents, but consent was refused.

Because of the serious implications of this case for school-aged children with health needs, and because of the apparent conflict between the decision in this case and the recent decision by this Court in **Irving Independent School**

District v. Tatro, 468 U.S. 883 (1984), Advocacy, Inc., S.K.I.P. of New York and S.K.I.P. of Texas, as amici curiae, submit that the points raised in the accompanying proposed brief would be helpful to the Court's consideration of the Petition for Writ of Certiorari.

For the foregoing reasons, Advocacy, Inc., S.K.I.P. of New York and S.K.I.P. of Texas respectfully request that this Motion for Leave to File Brief Amici Curiae be granted.

Respectfully submitted,

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November 12, 1987

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BRIEF AMICI CURIAE FOR ADVOCACY, INC., S.K.I.P. OF NEW YORK AND S.K.I.P. OF TEXAS IN SUPPORT OF PETITIONER MELISSA DETSEL

INTEREST OF AMICI CURIAE

Advocacy, Incorporated is one of the "Protection and Advocacy" systems created by Congress in Section 113 of Public Law 94-103, the Developmentally Disabled Assistance and Bill of Rights Act (1975), 42 U.S.C. Sec. 6042 as amended. For over ten years, Advocacy, Inc. has operated as Texas' agency to protect and advocate

the rights of persons with disabilities. In that capacity it has worked with thousands of citizens with disabilities and has represented a number of them in court, including residents of a group home for adults with mental retardation in **City of Cleburne, Texas v. Cleburne Living Center**, 473 U.S. ___, 105 S.Ct. 3249 (1985), and a child needing school health services, **Irving Independent School District v. Tatro**, 468 U.S. 883 (1984). Advocacy, Inc.'s victory in **Tatro**, and the benefits that have flowed to children needing school health services in order to attend school, are threatened by the instant case for which a Writ is being sought. Advocacy, Inc. currently represents several hundred students barred from admission to public school because the responsible school districts claim they should not have to

provide the school health services needed to enable the children to attend public school. Under the standard in **Tatro**, they will all be individually considered for services. Under the standard in the instant case, they would not leave their homes or institutions for even a portion of the day.

Amici curiae S.K.I.P. of New York and S.K.I.P. of Texas are state chapters of a nationwide organization, Special Kids need Involved People. The children whose parents are members of S.K.I.P. are very much like the Petitioner in the instant case. These children have benefitted from the clear standard enunciated in **Tatro** and are already seeing a loss of services because of the Second Circuit's opinion in this case.

Without clarification that **Tatro** is dispositive on the issue of the dividing

line between which school health services are includable under the applicable statute and which services are excludable as medical, amici curiae know that many children will be denied an opportunity for education enjoyed by their peers. For this reason, amici curiae respectfully ask the Court to grant Petitioner's Writ of Certiorari.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth by Petitioner.

SUMMARY OF THE ARGUMENT

Petitioners have set out concisely the compelling grounds on which they seek review of the judgment in this case. Amicus curiae support that petition on the grounds raised therein and respectfully emphasize three points.

First, in 1984 this Court decided the **Tatro** case unanimously on the issue of school health services under the Education of the Handicapped Act. For three years that clear standard has guided the provision of services to children such as Petitioner. In the instant case, however, the Second Circuit explicitly ignored this Court's decision in **Tatro** and created its own new standard which is in conflict with the Supreme Court ruling.

Second, Congress was clear in enacting the Education of the Handicapped Act, and its 1975 amendments, that children with disabilities were to be served in ways that afforded opportunities for interaction with nonhandicapped students. The Second Circuit ignored that requirement and created a standard which tolerates total

exclusion and total segregation from peers.

Third, damage is already being done by the Second Circuit's decision and school districts are backing away from enforcement of the Tatro standard.

ARGUMENT

I. The Supreme Court has already established in Tatro the test for providing school health services to students in special education but that test was ignored in this case.

For over three years, this Court's opinion in Irving Independent School District v. Tatro, 468 U.S. 883 (1984), has provided clear guidance on the provision of school health services by school personnel during school hours to a student with disabilities.

When Congress enacted the Education of the Handicapped Act, as amended by the Education for All Handicapped Children

Act of 1975, 20 U.S.C. Sec. 1400 et seq., (hereinafter "EHA"), it attempted to remove the barriers which caused schools to exclude certain students with handicaps. Amber Tatro was a student who would be excluded from school if it were not for the passage of the EHA. Amber needed the school health service of catheterization to enable her to void her bladder. The school refused to allow its personnel to perform that service, and Amber was excluded from public school.

In **Tatro**, supra, this Court established the standard for resolving such a conflict. First, is the child handicapped within the meaning of the EHA? Second, is the service a supportive service contemplated by the EHA? Third, does the service have to be performed during school hours? Fourth, without the service would the child be excluded from

school? 468 U.S. at 890. Fifth, is the particular service excluded as a medical service because it could not be performed by a school nurse or other qualified person other than a physician? 468 U.S. 891-895.

In regard to the latter point, this Court decided that the medical services exclusion "was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." 468 U.S. at 892. This Court then approved the regulations promulgated by the Department of Education (468 U.S. at 891-892) and stated clearly that the medical services exclusion is limited "to the services of a physician or hospital ...." 468 U.S. at 893.

Thus this Court crafted a clear and workable standard in **Tatro** that services

that are needed in order to enable a handicapped child to be in school during the day, and which can be provided by a nurse or other qualified person short of a physician, are required under the EHA.

That standard was totally ignored by the Second Circuit in deciding the instant case. **Tatro** is not even mentioned in that decision. **Detsel v. Board of Education of the Auburn Enlarged City School District**, 820 F.2d 587 (2nd. Cir. 1987).

In contrast to **Tatro**, the Second Circuit created a very subjective three prong test. First, they ask is the service complicated? Second, they ask is the service needed constantly rather than intermittently? Third, they ask must the person providing the service care for other children? 820 F.2d at 588. An affirmative answer to any of the three

presumably excludes the service. The implication is clear that under the EHA, as interpreted by the Second Circuit, a school need only provide casual and simple related services but not anything that requires continuous attention.

The Second Circuit adopted the reasoning of the lower court, 637 F.Supp. 1022 (N.D. N.Y. 1986), which characterized this Court's decision in **Tatro** by saying: "The Supreme Court held only that school nursing services of a simple nature are not excludable as therapeutic medical services." 637 F.Supp. at 1027. There is thus a large gap between the **Detsel** standard and the **Tatro** standard. In **Tatro**, a service is included in the EHA if it meets the requirements detailed supra including requiring less than a physician. In **Detsel**, the service is not required if it

is not simple and if the person providing the service might also be required to care for others.

II. The Second Circuit's decision ignores the mandate for integration with the nonhandicapped.

The result of the Second Circuit's decision is the predictable exclusion from school of children with complicated school health needs. If a school decides the needed service is "complex" rather than "simple," they can refuse. Worse, if the school decides not to hire enough personnel, so that one school nurse is stretched very thinly across services to many children, the school can refuse to provide the service as requiring too much of the designated service provider's time and thus being too "extensive." 637 F.Supp. at 1026.

The EHA was enacted to cause schools to provide the services needed to enable

children to be served in school. **Detsel** takes us back pre-EHA to allow schools to refuse services knowing that the result is total exclusion and segregation to "in-home instruction."

As this Court found in its first examination of the EHA: "The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible." **Board of Education v. Rowley**, 458 U.S. 176, at 202 (emphasis supplied). It is quite "possible" to educate Petitioner with nonhandicapped children, but the school district does not want to provide the related services personnel staffing ratio needed to accomplish that goal. The Second Circuit, in reaching its decision, never considered the mandate for education with the nonhandicapped and the duty to explore "supplementary aids and

services" when needed to keep a child in the regular environment. 20 U.S.C. Sec. 1412(5). The District Court opinion, adopted by the Second Circuit, did not discuss this mandate either.

Two other Circuits have considered similar school health needs and the mandate of integration. The Ninth Circuit found: "The congressional preference for educating handicapped children in classrooms with their peers is made unmistakably clear in section 1412(5)(B) of the Act ...." **Department of Education v. Katherine D.**, 727 F.2d 809 (9th Cir. 1984) cert. denied, 472 U.S. 1117 (1985), at 817. (Katherine breathes through a trachestomy tube, has to be suctioned several times a day, and required emergency care to reinsert the tube if it became dislodged from her "floppy" windpipe.)

Similarly, the Third Circuit decided: "Given the advantages of placement in as normal an environment as possible, to deny a handicapped child access to a regular public school classroom without a compelling educational justification constitutes discrimination and a denial of statutory benefits." **Tokarcik v. Forest Hills School District**, 665 F.2d 443 (3rd Cir. 1981), cert. denied sub nom. **Scanlon v. Tokarcik**, 458 U.S. 1121 (1982), at 458. (Child paralyzed from waist down, requiring catheterization.)

The result of the refusal of the Second Circuit to recognize that services in the least restrictive environment must be considered is to relegate this class of children to service in the most restrictive environment -- in-home instruction. One court which reviewed such instruction found "... plaintiff's

education will be reduced to some type of homebound tutoring. Such a result can only serve to hinder plaintiff's social development and to perpetuate the vicious cycle in which she is caught." **Stuart v. Nappi**, 443 F.Supp. 1235 (D. Conn. 1978), at 1240. That court reviewed homebound instruction several years later and, referring to the irreparable injury to social development, found "this result is incompatible with both his right to be educated with nonhandicapped children to the maximum extent appropriate and the obligation of the school to provide a continuum of alternative placements to meet his special educational needs." **Blue v. New Haven Board of Education**, ____ F.Supp. ____ (D. Conn. 1981), reprinted in 3 Education of the Handicapped Law Reporter 552:401, at 407.

This exclusion would be particularly sad for Petitioner since the record shows that she interacted regularly with nonhandicapped children in school and that interaction was considered to be the cause of her development of speech, communication and social skills. The Second Circuit's "balancing the interests of the parties" test (820 F.2d at 588) would favor not bothering a busy nurse rather than developing the ability of a handicapped girl to interact in a world of her peers.

III. The Detsel decision has already begun to erode the Tatro standard.

Amici curiae have already observed an erosion of the protection won in Tatro. Members of amici curiae organizations have noted a new resistance among some school districts to provide even catheterization, let alone more complex

school health services. The recent case of **Bevin H. v. Wright**, 666 F.Supp. 71 (W.D. Pa. 1987) is a perfect example. In **Bevin H.**, the multiply handicapped child was being served in a public school program which all parties agreed was the appropriate, least restrictive environment. Nursing services everyone agreed were necessary for Bevin to attend school were paid for by parents' insurance. 666 F.Supp. at 72.

However, when Bevin's insurance carrier limited reimbursement to ten hours of nursing service per week and Bevin's parents asked the school to assume the cost, the school no longer thought the services appropriate. The District Court recognized that although this issue of related services had been dealt with in two Supreme Court cases and four Circuit Court cases, it found the

dispositive case to be **Detsel**. 666 F.Supp. at 74. The District Court in **Bevin H.** referred to this Court's decision in **Tatro** only twice in passing, both times citing **Tatro** in a string with several other cases. 666 F.Supp. at 74.

The **Bevin H.** standard denies any duty of a school to provide nursing services which are "varied, intensive and costly," 666 F.Supp. at 76, adding on to the **Detsel** standard which allows the prohibition of services which are complex, extensive or require continuous attention.

Thus, if **Detsel** is allowed to stand unreviewed by this Court, that decision and its progeny will allow schools to ignore **Tatro** when they feel they can apply their interpretation of terms such as "intensive," "extensive," "varied," "complex," "continuous," and/or "costly."

With that menu of excuses available, why would any school district feel bound to defer to this Court's decision in **Tatro**?

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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